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Supreme Court of the United States

OCTOBER TERM, 1928

No. 159

JOHN F. GILCHRIST, LEON G. GODLEY and CHARLES C. LOCKWOOD, constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the State of New York, *et al.*,

Appellants,

against

INTERBOROUGH RAPID TRANSIT COMPANY and MANHATTAN RAILWAY COMPANY,

Appellees.

BRIEF ON BEHALF OF APPELLEE, THE MANHATTAN RAILWAY COMPANY

GEORGE WELWOOD MURRAY,
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Counsel.

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given the franchise under which the railroads were constructed to which the extensions were added, prescribed the rate of fare to be charged on such railroads and did not limit the fare to five cents a ride. The City urges that the local authorities in consenting to the construction of the extensions conditioned their consent on a change of the fare on the railroads to which the extensions were added. Such a condition, if it was in fact made, is invalid. The constitution merely requires the consent of the local authorities to the construction of the railroad. The statute gives authority to the Commission to authorize the construction of the extensions and prescribes the terms and conditions on which the local authorities must consent or refuse to consent to its construction. Under the terms of the statute the local authorities had no power to condition their consent to a change of fare on the properties to which the extensions were added 49

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Opinion of the District Court.

The opinion of the Statutory Court is reported in 26 Federal Reporter, 2nd Series, page 912.

Statement of Facts.

The question discussed in this brief is whether the Interborough Rapid Transit Company has the legal right to charge a fare in excess of five cents a ride on the elevated railroads operated by it. The City and the Commission contend that the fare on the elevated railroads is restricted

to five cents a ride by a provision contained in a Certificate granted in 1913 by the Public Service Commission to the Interborough Company, authorizing it to construct extensions to the elevated railroads which it then operated. The Extension Certificate, which purports to limit the fare to five cents a ride not only on the extensions but also on the railroads to which the extensions were added, was granted under Section 24 of a statute of the State of New York enacted in 1891 and generally referred to as the Rapid Transit Act (Chap. 4, Laws of 1891).

The Manhattan Railway Company, a defendant whose rights make it in substance a plaintiff, contends that the statute under which the Extension Certificate was granted did not give power to the Commission to restrict the fare on the extensions and certainly not to change the fare on the railroads to which the extensions were added; that the Interborough Company as lessee has the legal right to charge such fare on the elevated railroads as is permitted by the franchise under which these railroads were constructed and are now operated. Such franchise does not confine the fare to five cents a ride. This part of the case involves the meaning of Section 24 of the Rapid Transit Act as it was in 1913, when the Extension Certificate was granted, and specifically raises the question whether that section of the statute gave power to the Commission to limit to five cents a ride the fare on the elevated railroads to which the extensions were added.

At the time the Extension Certificate was granted no law could constitutionally authorize the construction or operation of a street railway except upon the condition that the consent of the local authorities having the control of the portion of the street upon which it was proposed to construct the railroad be first obtained (Article Three, Sec-

tion Eighteen of Constitution of State of New York). The City and the Commission contend that the consent of the local authorities of the City, to the construction and operation of the extensions was made conditional on the restriction of the fare to five cents a ride, both on the extensions and on the elevated railroads to which they were added. The Manhattan Railway Company contends that even if the local authorities had purported to condition their consent by limiting the fare they did not have such power under the Constitution and the statute.

The power to authorize the construction of the extensions was given by the statute to the Public Service Commission; the Commission was required by the statute to determine the streets on which the extensions should be constructed and the extent to which the extensions should occupy the streets, but the Commission had no power to prescribe a rate of fare, either for the extensions or for the railroads to which the extensions were added. The local authorities were required under the statute either to consent or to refuse to consent to the construction of the extensions on the streets determined by the Commission, but the local authorities had not the power to impose terms or conditions on which the extensions should be constructed and had not the power to condition their consent by restricting the rate of fare either on the extensions or on the railroads to which the extensions were added. This part of the case involves the meaning of the Rapid Transit Act as it was in 1913. The question is whether the Act confined the consent of the local authorities so that in giving their consent to the construction of an extension they could not restrict the fare.

The Manhattan Railway Company has a vital interest in the return on the elevated railroads operated by the Inter-

borough Company, as the amount which will be paid on the stock of the Manhattan Company as rental is dependent on the earnings of the elevated railroads. These elevated railroads under a five-cent fare earn far less than a reasonable return on their value.

The facts out of which the foregoing problems arise are as follows:

The Interborough Rapid Transit Company operates two systems of rapid transit railroads in the City of New York; the one, the elevated railroads owned by the Manhattan Railway Company, and leased to the Interborough Company in 1903 for a term of years; the other, the subways constructed by joint contribution of funds by the City of New York and by the Interborough Company, and operated by the Interborough Company under a contract for a term of years. The rate of fare which may be charged on the elevated railroads, unless validly restricted by the Extension Certificate, is determined by the franchise granted to the Manhattan Railway Company which authorized the construction and operation of the elevated railroads but did not limit the fare to five cents a ride. The question is, has the rate of fare which the Interborough Company, as lessee, may charge on the elevated railroads been validly restricted to five cents a ride?

Under the lease the rental to be paid to the Manhattan Company, which was a direct obligation of the Interborough Company not dependent on the earnings was as follows:

4 per cent on the bonds of the Manhattan Company, of which substantially $45,000,000 are now outstanding;

7 per cent on the stock of the Manhattan Company, of which $60,000,000 par value is now outstanding;

$35,000 per annum to cover administration expenses. (R. p. 1225.)

In 1922 a voluntary plan of readjustment was made under which stockholders of the Manhattan Company owning 95 per cent of its stock agreed to reduce the dividend rental to be paid on their stock from 7 per cent per annum as provided in the lease to the following rates:

3 per cent for the year ending June 30, 1923;
4 per cent for the next year; and
5 per cent per annum thereafter.

The payment of the reduced dividend rental under the plan of readjustment was made conditional on the net earnings, so that if the reduced rate was not paid in full in a given year the net earnings of the Interborough Company from all its properties, subway and elevated, or the net earnings of the elevated railways alone, whichever net earnings are the larger, must be applied to the payment of the dividend rental. The reduced dividend rental is cumulative and the application of the net earnings is mandatory. (R. p. 1225.)

The amount required to pay in full the dividend rental in any year after 1924 is $3,088,000. The net earnings of the elevated railroads for the fiscal year ended June 30, 1927, was $1,395,000, and the estimated net earnings of the elevated railways for the year ended June 30, 1928, was $764,000 (R. p. 1325). The foregoing net earnings were calculated in accordance with the provisions of the plan of readjustment without deducting the interest and sinking fund amounting to $3,182,000 on the securities of the Interborough Company, the proceeds of which were used to construct the extensions and other improvements to the elevated railroads which the Interborough Company as lessee made at its own expense. If the charges on these Interborough bonds issued to make improvements to the

elevated railroads were deducted, the elevated railroads would have failed to earn their interest charges in the year 1927 by $1,787,000 and in 1928 by $2,418,000, notwithstanding the rate of interest on the bonds of the Manhattan Company is 4 per cent per annum and there is no sinking fund.

Although the earnings of the subways are also required under the plan of readjustment to be applied to the payment of the dividend rental on the stock of the Manhattan Company, we are confining our discussion in this brief to the rate of fare which may be charged on the elevated railroads which are owned by the Manhattan Railway Company. The City by a notice given to the Interborough Company in 1927 has prevented the application of any part of the subway earnings to the stock of the Manhattan Company notwithstanding the provisions of the plan of readjustment (R. p. 1322).

The book cost of the elevated railroads of the Manhattan Railway Company leased to the Interborough Company, excluding improvements made by the Interborough Company at its own expense, is $112,943,000. The original cost of the extensions and other improvements to the elevated railroads made after 1913 by the Interborough Company at its own expense is $44,000,000. The total cost of the elevated railroads operated by the Interborough Company is at least $157,000,000. Of this total cost $23,000,000 was paid by the Manhattan Company to the owners of property abutting on the streets where the elevated railroads are located for the acquisition of the easements of light, air and access (R. p. 1332).

The inadequacy of the return on the elevated railroads may be shown by comparing the net earnings with the cost of the easements of light, air and access and the cost of

the improvements made by the Interborough Company after 1913 with approval of the Public Service Commission. In ascertaining the net earnings of the elevated railroads above set forth for the years 1927 and 1928 the only interest charges deducted were $1,808,000, being 4 per cent on the $45,000,000 principal amount of bonds of the Manhattan Railway Company. The total amount of the earnings of the elevated railroads in 1927 after the payment of the operating expenses, maintenance and taxes and before payment of any interest charges was $3,203,000, and in the year 1928 was estimated to be $2,572,000. The return therefore on the elevated railroads for the year 1927 of $3,203,000 before payment of any interest charges is less than five per cent on the $66,000,000 which represents the combined cost of the improvements to the elevated railroads made by the Interborough Company and the amount paid by the Manhattan Railway Company for the easements of light, air and access, and for the year 1928 the $2,572,000 is less than four per cent on the cost of such improvements and easements. Before the improvements were made by the Interborough Company the Manhattan Railway Company had a complete railroad which in 1917 carried 349,000,000 passengers.

The dividend rental on the stock of the Manhattan Company was not paid in full in 1927 and will not be paid in full in subsequent years unless the rate of fare is increased, as the earnings of the elevated railroads under the five cent fare are sufficient only to pay a small part of such dividend rental.

The failure of the Interborough Company to earn on the elevated railways alone the reduced dividend rental on the stock of the Manhattan Company is caused by the high operating costs and the low fare which has been charged.

From the inception of the lease in 1903 to 1917, after which period the high costs substantially affected the earnings, the Interborough Company earned through the operation of the elevated railways, without the elevated extensions or other improvements which it constructed at its own expense, an aggregate profit of $18,000,000 over the full rental (R. p. 1225). The traffic on the elevated railways is ample under a proper fare to earn a reasonable return on the property and to pay the dividend rental in full notwithstanding the high costs. In 1902, the year before the lease was made, the elevated railways carried 215,000,000 passengers, in 1917 they carried 349,000,000 and in 1927 they carried 359,000,000 (R. p. 1328).

As long as the costs of operation were moderate, a reasonable return could be earned on the elevated railways even under a five cent fare. When the lease was made in 1903 and until the Extension Certificate was granted in 1913 there was no restriction which confined the fare which either the Manhattan Company or the Interborough Company could charge on the elevated railways to five cents a ride, yet the Interborough Company without such fare restriction charged only five cents a ride.

In 1913 the Extension Certificate was granted to the Interborough Company authorizing it to construct and operate certain extensions to the elevated railroads. This Certificate contained the following provision limiting to five cents for one continuous ride the fare which may be charged on the extensions authorized to be constructed under the Certificate and on the elevated railroads to which the extensions were added:

> "The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the

Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more."

(The "Railroads" referred to in the foregoing provision are the extensions.)

After the Extension Certificate became effective the Interborough Company merely continued to charge the five cent fare on the elevated railroads which it had theretofore charged.

About 1917 the high costs following the war turned the profits on the elevated railways into losses. In 1922 the dividend rental upon the stock of the Manhattan Company and substantial amounts of taxes on the elevated railways were unpaid. In view of the inability of the Interborough Company to discharge its obligations under the high costs and the five cent fare a voluntary plan of readjustment was made in 1922 under which the holders of 95 per cent of the stock of the Manhattan Company agreed to accept a substantial reduction in the dividend rental and to make the payment of the reduced dividend rental conditional upon earnings. The holders of Interborough securities also made substantial sacrifices under the plan. The Transit Commission approved the plan. At the time the plan of readjustment was made the Interborough Company was in default under the lease of the Manhattan Company through the failure to pay the dividend rental and the taxes; the Manhattan Company had the right therefore to retake its properties and to operate them without a five

cent fare restriction. Without the determination of the validity of the fare restriction in the Extension Certificate the stockholders of the Manhattan Company accepted the reduction in the dividend rental under the plan of readjustment (R. p. 1225).

At the time the plan of readjustment was made in 1922 the City of New York held a peculiar fiduciary relation to the elevated railways operated by the Manhattan Company. The City had the right to share in the net profits from these elevated railroads. It had the right on written notice to terminate the franchise to construct and operate the extensions and to purchase the extensions by paying less than their value; the remaining compensation to the Company, if any, for the properties so purchased must come out of the revenue up to the time of the purchase. The City at the expiration of the Extension Certificate will own the extensions free from all encumbrances without the payment of any compensation. The compensation for the extensions, if any, in this case, must be made out of earnings through the payment of a sinking fund of one per cent a year on the bonds which were sold to the public in order to provide the funds with which to build the extensions.

In order to safeguard the City's share in the profits and its right to purchase the extensions for less than their value, the extension certificate gives the City certain control over the operation of all the elevated railways operated by the Interborough Company, including supervision of operation, the right to object to any contract pertaining to operation which extends beyond the period of one year or involves an expenditure in excess of $50,000, and also the right to object to any expenditure pertaining to operation as unreasonable or improper whether the expenditure has

been made or is to be made. The purpose of this provision is stated in the Extension Certificate to be "that the city shall be afforded all proper and necessary means for safeguarding its right to one-half of the excess of net profits of the elevated railways and for safeguarding its exercise of the right to terminate the extension certificate."

The City has the power under the statute to construct at its own expense and to own and operate railroads which will compete with the railroads in whose profits the City shares, whose extensions the City may purchase for less than their value and which it will own at the end of the franchise without compensation. The City is now constructing its own railways which will compete with and take a substantial part of the traffic from the elevated railroads. The City will thus have at one time the right to share in the profits of the elevated railways, the right to purchase the extensions for less than value, the right to own the extensions at the expiration of the franchise without payment of compensation, the right to compete by its own railroads with the railroads in which the City has the foregoing rights. Under such circumstances the Court will not be disposed to give to language a strained and unnatural meaning in order to increase the powers which the City may have over the elevated railways by including the power to determine the rate of fare on such railways.

In insisting that the Interborough Company may charge no more than a five cent fare on the elevated railroads under the foregoing circumstances the City is proceeding on the assumption that the fare restriction in the Extension Certificate is valid or that the local authorities conditioned their consent to the construction of the extensions by limiting the fare on the railroads to which the extensions were added. The regulation of fares on such

properties is within the police power of the State; such power to regulate cannot be exercised except by the legislature unless the power is delegated in language which cannot fairly and reasonably be given any other meaning.

The first question is whether Section 24 of the Rapid Transit Act, under which the Extension Certificate was granted, gave power to the Commission in authorizing the construction and operation of the extensions, in language which could not fairly or reasonably be given any other meaning, to make the grant conditional upon the restriction of the fare even on the properties to which the extensions weer added. The language of the statute on which the City relies does not refer to the railroads to which the extensions were added in any manner or for any purpose, much less does it give to the City the power to change the rate of fare theretofore definitely established on such railroads by the provisions of the franchise under which the railroads were constructed. In this brief an examination is made of the Rapid Transit Act as it was in 1891, and also of the Act as it was in 1913 after certain amendments had been made to it, for the purpose of showing that the language on which the City relies for power in the Commission in authorizing extensions to change the established fare on the railroads to which the extensions were added does not give such power.

The language in the statute on which the City and the Commission rely for power to change the fare on the railroads to which the extensions are added (Sec. 24 of the statute as it was in 1913) is as follows:

> "* * * and the commission shall * * * fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall

be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, *and such other terms, conditions and requirements as to the said boards may appear just and proper* • • •". (The foregoing italics are ours. Wherever we use italics in this brief they are ours unless otherwise indicated.)

(This Section 24 gives power to the Commission to authorize the construction of extensions. The same language as is now contained in Section 24 and on which the City and Commission rely, was contained in the statute of 1891 when it was first enacted (Sec. 32) which also gave power to the Commission to authorize the construction of extensions.

The City contends that the foregoing words contained in Section 24 of the statute cannot reasonably be given any meaning except that they not only include the power to fix a rate of fare to be charged on the extensions which is different from the rate of fare charged on the railroads to which the extensions are added, but also that this language applies to the railroads to which the extensions are added and gives power to the Commission to change the rate of fare definitely established on these railways by the franchise under which the railroads were constructed.

Under the 1891 statute before amendment the Board of Commissioners was required to sell at public auction for account and benefit of the City the right, privilege and franchise to construct and operate a railway in the City; the terms of sale must provide the maximum rates of fares which may be charged for the carriage of persons and must be part of the articles of association under which the corporation is created; the corporation shall have power to carry persons and to receive compensation therefor not inconsistent with the terms of sale under which the corpora-

tion acquired its rights, privileges and franchises. Any attempt in the Extension Certificate granted under the Rapid Transit Act as it was in 1891 before amendment to determine the fare on the properties to which the extensions were added would be in conflict with the provisions as to fare contained in the terms of sale under which the franchise to construct and operate the railroads was acquired, as there is no provision for amending the terms of sale.

The power to prescribe the fare in the articles of sale as to the main properties was given in the 1891 statute in clear and unambiguous language. It is only reasonable to expect that if power were given in the same statute to the Commission in authorizing the construction of extensions to change the fare thus definitely established in the articles of sale such power to change the fare would have been expressed at least as clearly as the power to establish the fare originally. Yet language designed to express the intention to give power to the Commission in authorizing extensions to determine or change the rate of fare was not used in the statute at any time.

In the body of this brief we examine the Rapid Transit Act at length. We contend that Section 24 cannot be construed to apply to anything except the extensions; that this section does not apply by implication or otherwise to the properties to which the extensions were added; that the section does not give power to determine the fare even on the extensions, and obviously does not give power to change the fare on the properties to which the extensions are added.

In the same section of the statute (Sec. 24) under which the Extension Certificate was granted there is the following provision which shows that the extension was to be regarded as an extension and that the fare on the extension

was controlled by the franchise under which the railroad was constructed, to which the extensions are added:

> "* * * and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such railway company may construct the same with all the rights, and *with like effect as though the same had been a part of the original route of its railway then in actual operation.*"

Power has been given to the Commission in the Rapid Transit Act to regulate fares on various properties from time to time, but in every case specific and definite words were used about whose meaning there could be no doubt. Never in the history of the statute have words of the character relied upon by the City in the present case been used to give power to the Commission to regulate rates. Although the section giving the Commission power to authorize the construction and operation of extensions was a part of the statute when it was first enacted in 1891 and has continued to be a part of the statute up to the present time, the Legislature has never included in this section the words which it invariably used in granting power to the Commission to regulate fares.

The City and Commission also contend that the local authorities whose consent to the construction of the extensions is required both under the Constitution and under the Rapid Transit Act, in giving such consent, imposed a condition that the fare on the railroads to which the extensions were added should be changed so as not to exceed five cents a ride. If we assume that such a condition was in fact imposed by the local authorities, the question still remains whether the local authorities had under the Constitution and the statute the power to impose the condition.

The power to construct the extension is derived from the statute, but the consent of the local authorities is necessary both under the Constitution and the statute before the extension may be constructed. The Constitution merely provides that the extension cannot be constructed without the consent of the local authorities. The statute provides that the railroad may be built if the consent of the local authorities is given in the manner and under the restrictions prescribed in the statute; that such extensions shall not be constructed if such consent of the local authorities is not so given.

Under the statute the Commission itself has not the power in granting authority to construct the extensions to restrict the fare on the properties to which the extensions are added. The local authorities have even less power than the Commission, as the local authorities must give or withhold their consent when at most they are informed of the streets on which the extensions will be located and the extent to which the extensions will occupy such streets. The fare to be charged on the extensions is determined by the franchise under which the railways were constructed to which the extensions are added.

In this brief we have examined the Rapid Transit Act both as it was in 1891 when it was first enacted and in 1913 after various amendments had been made, for the purpose of showing that if, in fact, the Commission had conditioned its consent by restricting the fare on the railroads to which the extensions were added, the restriction would have been invalid, as the Commission had not the power to condition its consent in this manner.

ARGUMENT.

Point I.

The fare restriction in the extension certificate is invalid, because the Rapid Transit Act (Laws of New York, 1891, Chapter 4) as amended, did not give to the Commission in authorising, in 1913, the construction of extensions to the elevated railways, the power to change the fare on such railways which is prescribed in the franchise under which they were constructed.

For the purpose of ascertaining the meaning of Section 24 of the Rapid Transit Act as it was in 1913, we first examine the statute as it was in 1891 and then examine the statute as it was in 1913 after various amendments had been made.

There was no power given to the Commission in the statute as it was in 1891 before any amendments were made, in authorizing the construction of extensions to existing railroads, to change the fare prescribed by their franchise on the railroads to which the extensions were added.

The Act, when passed in 1891, was entitled: "An Act to provide for rapid transit railways in cities of over one million inhabitants", but the statute actually applied only to the City of New York as no other city in the State had a population in excess of one million.

The statute as it was in 1891 provides for the appointment of a Board of Rapid Transit Commissioners, which was given power to authorize the construction and operation of rapid transit railways in the City and also, from

time to time, to authorize the construction and operation of connections, extensions, additional track or facilities to such railways. We first examine the provisions of the statute of 1891 before it was amended, which give power to the Board of Commissioners to authorize the construction and operation of rapid transit railways, and next examine the provisions of the statute as it was in 1891 which gave power to the Board of Commissioners to authorize the construction and operation of connections, extensions, additional track or facilities to such railway. The purpose of this examination is to determine whether in the original statute the Commission was given power in authorizing the construction of extensions to change the fare on the railroads to which the extensions were added whose fare had theretofore been definitely established by the franchise under which the railway was constructed. This is important as the language on which the City relies for such power was contained both in the statute as it was in 1913 and in the statute as it was in 1891.

In the Act of 1891, before amendment, the Board of Commissioners was given power to authorize the construction and operation of rapid transit railways in the City and was required to prescribe in the franchise the rate of fare to be charged thereon.

Under the Rapid Transit Act as it was in 1891, before amendment, the Board of Commissioners may on its own motion, or upon request of the local authorities of the City, shall, consider and determine whether it is for the interest of the public and of the City that a rapid transit railway in the City should be established, and for this purpose conduct such an inquest and investigation as it may deem necessary. If, after such inquest and investigation, the

Board of Commissioners determines that such railway is necessary, it shall proceed to determine and establish the routes thereof and the general plans of construction. The general plans of construction shall show the general mode of operation and contain such details of construction as will indicate the extent to which any street will be encroached upon by the railway and the property abutting thereon affected.

The Board of Commissioners may locate the routes over, under or upon any street, except the streets specially named in the statute; provided that the consent of the owners of one-half in value of the property bounded on and the consent of the local authorities having control of the streets on which it is proposed to construct the railway must first be obtained, or, in case the consent of the property owners cannot be obtained, there shall be secured in lieu of such consent of property owners an order of court decreeing that such railroad ought to be constructed (Sec. 4).

As soon as the Board of Commissioners has determined the routes and general plans of construction, it shall transmit a copy of the general plans of construction and the conclusions adopted by the Board to the common council of the City, which shall proceed to consider such general plans of construction in the manner provided in the statute. When the general plans of construction have been adopted by resolution of the common council and have been approved by the Mayor, they shall be deemed to have been finally consented to and adopted and such consent shall be deemed to be the consent of the local authorities of the City. If the control of the street on which the railroad is to be located is vested in any local authority other than the common council, the approval of the general plans and

the consent to the construction of the railway thereunder shall be given by such local authority. After the Board of Commissioners has secured the approval and consent of the local authorities, it shall take steps to secure the consent of the property owners along the routes; if the consent of the property owners cannot be secured, the Board may make application to the court for appointment of Commissioners to determine whether such railroad ought to be constructed (Sec. 5).

In the examination of the statute of 1891 before amendment it is necessary to observe that the local authorities are to consent only to the adoption of the routes and the general plans of construction.

When the consent of the local authorities and of the property owners shall have been obtained or in lieu of the consent of the property owners the authorization of the court the Board of Commissioners shall prepare detailed plans and specifications for the construction of the railway (Sec. 6).

After having secured the necessary consents and having prepared the detailed plans and specifications, the Board of Commissioners shall sell at public auction in the city where the railroad is to be constructed and for the account and benefit of the city the right, privilege and franchise to construct and operate the railroad. Public notice of the time and place of the sale shall be given. The Board may prescribe all such terms and conditions of sale as it may deem to be for the interest of the City and the public. The statute requires the terms of sale to prescribe various things, among them: the construction of the railroad under the supervision of the Board of Commissioners; the successful bidder to deposit security approved by the Board of Commissioners to insure performance; the organization

by the purchaser of a corporation to exercise the franchise and to construct and operate the railroad; the time within which the construction of the railroad shall be begun and within which it shall be finished. The terms of sale must also contain the following important provision prescribing among other things the fare to be charged for the carriage of passengers:

> "The said terms of sale must also specify the amount of the capital of any such corporation, and number of shares of capital stock which such corporation shall be authorized to issue, the percentage to be paid in cash by the subscribers on subscribing for such shares, the maximum amount of the bonded indebtedness which such corporation be authorized to incur, and which may be secured by mortgage upon its property and franchises, *and the maximum rates of fares and freight which such corporation may charge and collect for the carriage of persons and property.* The said board may, if it considers that the public interest requires it to do so, reject all bids and readvertise the said rights, privileges and franchises for sale, with the same or different terms of sale, as often as it may deem necessary in the interest of such city, and shall finally accept that bid, which under all circumstances in its opinion is most advantageous to the public and such city; and no bid shall be accepted without the concurrent vote of four members of the board. The terms of sale on any such resale must contain all the provisions required by this act to be inserted in the original terms of sale." (Sec. 7.)

It is to be observed that the terms of sale alone prescribe the fare to be charged; that the consent of the local authorities is not required to the terms of sale either on the original offering of the franchise for sale or on any subsequent offering, and that different terms of sale may be used when the franchise is subsequently offered for sale.

Within one year prior to the expiration of the term for which the franchise shall have been sold the Board of Commissioners shall proceed to resell the right to maintain and operate the railway. Such sale shall be made in the manner prescribed for the original sale (Sec. 8). The consent of local authorities is not required on such a resale.

The articles of association under which the corporation is formed, which will construct and operate the railway, must state among other things that such articles are made and filed for the purpose of taking and exercising the rights, privileges and franchise so purchased, according to the terms of sale. Such terms of sale and all plans and specifications must be made a part of the articles of association, annexed thereto and filed therewith in the public office prescribed by the statute. The articles of association must be approved by the Board of Commissioners and must contain such other provisions as the Board of Commissioners may deem requisite and necessary not inconsistent with the terms of sale or with the statute.

The Board of Commissioners shall supervise the subscription to the capital stock of the corporation which is organized to construct and operate the railroad under the franchise and shall call a meeting of subscribers for the purpose of organizing the corporation. The person or persons whose bid shall have been accepted by the Board of Commissioners shall if they elect to become subscribers to the capital stock of the corporation be entitled to a preference for themselves and their associates in subscribing for and in the allotment of the shares of capital stock of such corporation (Sec. 11).

A complete record of the proceedings of the meeting of subscribers shall be prepared, be approved by the Board of Commissioners and be filed in the office of the secretary of state (Sec. 13).

The Board of Commissioners if in their judgment the public interest requires may alter or add to the detailed plans and specifications contained in the articles of association provided the plans and specifications as so modified do not change the route or routes of said railway and be not inconsistent with the general plans of construction and provided also that such modifications be first approved by vote of two-thirds of the directors of said corporation (Sec. 14).

Among the powers of the corporation are the following:

> "4. To take and convey persons and property on its railway or railways by the power or force of steam, or by any motor other than animal power, and to receive compensation therefor not inconsistent with the provisions of this act and the terms of sale under which the said corporation shall have acquired its rights, privileges and franchises."
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> "6. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, but the amount of such bonds outstanding at any one time shall not exceed the amount limited by the articles of association." (Section 24.)

The corporation owning the franchise shall take, transport and discharge such passengers and property on the due payment of the freight or fare legally authorized therefor; and shall be liable to the party aggrieved in an action for damages for any neglect or refusal (Sec. 28).

The statute of 1891 before amendment thus provides that the consent of the local authorities is required only for the general plans of construction and not for the detailed plans and specifications nor for the terms of sale;

that the franchise shall be sold at public auction for the account and benefit of the City; that the terms of sale must prescribe the rate of fare to be charged; that the franchise may be offered for sale from time to time on the same or different terms of sale; that the corporation shall have power to convey persons and property and to receive compensation therefor not inconsistent with the provisions of the statute and the terms of sale under which the corporation shall have secured its franchise.

In the Act of 1891 before it was amended, the Board of Commissioners is given power to authorize the construction and operation of connections, extensions, additional tracks or facilities to existing rapid transit railroads, but is given no power to change the rate of fare to be charged on the railroads to which the connections or other property is added.

The statute of 1891 before amendment gives power to the Board of Commissioners to authorize the construction and operation of connections, extensions, additional tracks and facilities to existing rapid transit railroads in the City (Sec. 32). The Board of Commissioners under Section 32 may from time to time upon application of a railroad corporation owning or operating a railroad wholly or in part within the limits of the City, if in the judgment of said Board of Commissioners the public interest so demands, fix and determine the route or routes by which any such railway company may "connect with other steam railways, or the stations thereof, or with steam ferries, or may extend its lines within said city and may authorize any such railway company to lay an additional track or tracks on, above, under or contiguous to a portion or the whole of the route or routes of its railway or railways within said

city and to acquire terminal or other facilities necessary for the accommodation of the traveling public on any street or place except the place now known as Battery Park on which said railway shall be located".

After giving the Board of Commissioners power to fix and determine the routes of such connections, extensions, additional track or facilities, Section 32 of the statute contains the following provision:

> "and the said board shall fix and determine the locations and plans of construction of the railways upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said railway company, *and such other terms, conditions and requirements as to the said board may appear just and proper.*"

The foregoing provision of Section 32 of the Act of 1891 is important because the City and the Commission rely on this provision, which is also in Section 24 of the statute as it was in 1913, for power in the Commission in authorizing in 1913 the construction of extensions, to change the fare on the elevated railroads to which the extensions are added, which fare was definitely prescribed in the franchise under which the railroads were constructed. The City and the Commission rely especially on the following words in the foregoing provision:

> "and such other terms, conditions and requirements as to the said board may appear just and proper."

The statute of 1891, Section 32, next provides that the Board of Commissioners shall prepare a Certificate setting forth in detail the action taken by the Board with respect to such connecting or extended route or routes and

such additional tracks and facilities, and the terms, conditions and requirements referred to in the statute. Such Certificate shall be delivered to the railway corporation upon receipt by the Board of Commissioners of a written acceptance of said terms, conditions and requirements duly executed by the railway corporation so as to entitle it to be recorded. The Certificate shall be filed in the public offices designated in the statute and thereupon and "upon fulfillment by such railway corporation, so far as it relates to such connections, additional track or tracks, or facilities, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state, and upon fulfillment by such railway corporation of such other terms, conditions and requirements enumerated in said certificate, as the said board may require to be fulfilled as a condition precedent to commencing said work", the railway company shall have the following powers and rights:

> "said *railway company shall in such cases possess in addition to existing franchises* all the powers conferred by this act upon corporations specially formed thereunder, with respect to its railways authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, *such railway company may construct the same with all the rights, and with like effect as though the same had been a part of the original route of its railway then in actual operation.*"

The statute as it was in 1891 does not give power to the Board of Commissioners in authorizing the construction of an extension to change the fare prescribed in their franchise for the railroads to which the extensions are added for the following reasons:

The statute requires the terms of sale under which the franchise to construct and operate the railroad is sold at public auction to prescribe a definite fare to be charged on the railway. No similar requirement is contained in the statute as to connections, extensions, additional tracks or facilities. We place in one column the provisions of the statute as it was in 1891 before amendment, which require the terms of sale to prescribe the fare to be charged on a rapid transit railway, and in a parallel column the provisions of Section 32 of the statute which relate to connections, extensions, additional tracks or facilities and are also contained in Section 24 of the statute as it was in 1913:

Provisions of the statute as it was in 1891 which prescribe the fare to be charged on a rapid transit railway as distinguished from connections, extensions, additional tracks or facilities:	*Provisions in Section 32 of the statute of 1891 before amendment relating to connections, extensions, additional tracks or facilities:*
"The said terms of sale must also specify the amount of the capital of any such corporation, and number of shares of capital stock which such corporation shall be authorized to issue, the percentage to be paid in cash by the subscribers on subscribing for such shares, the	"and the said board shall fix and determine the locations and plans of construction of the railways upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said

maximum amount of the bonded indebtedness which such corporation be authorized to incur, and which may be secured by mortgage upon its property and franchises, *and the maximum rates of fares and freight which such corporation may charge and collect for the carriage of persons and property.*"

railway company, *and such other terms, conditions and requirements as to the said board may appear just and proper.*"

The foregoing sentence in Section 32, which is also contained in Section 24 of the statute as it was in 1913, is the language on which the City relies.

The rule of construction to be applied is that there is no power in the Commission in authorizing the construction of extensions to change the fare prescribed by the franchise for the railroads to which the extensions are added unless the statute cannot fairly and reasonably be given any other meaning.

City of Paducah v. *Paducah Railway Co.*, 261 U. S. 267;

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 211 U. S. 265;

Freeport Water Co. v. *Freeport City*, 180 U. S. 587.

This rule of construction exists because the power to regulate rates of fares is part of the police power of the State, which may be exercised only by the Legislature unless clearly and unequivocally delegated by the Legislature.

The question is whether under this rule of construction the foregoing words contained in Section 32 of the

statute as it was in 1891 before amendment are sufficient to give power to the Commission in authorizing the construction of an extension, to change the fare which it was required to prescribe for the railroads to which the extensions are added under a clear and unequivocal provision of the same statute. In requiring the Board of Commissioners to prescribe the rate of fare to be charged on the main properties the statute used the word "fare"; no similar word was used in Section 32 in respect of connections, extensions, additional tracks or facilities. The legislature required by definite language in the statute that the Board of Commissioners should prescribe in the terms of sale the fare to be charged on the main properties. If the legislature intended that the Board should have power in authorizing the construction of an extension to change the fare to be charged on the main properties, it is reasonable to expect that the power to change the fare would be expressed in the statute at least as clearly as the power in the same statute to prescribe the fare originally. This is not done.

Section 32 not only does not include the power to regulate fares, but gives no power whatever over the existing railroads to which the extensions are added. The sentence from Section 32 in the foregoing column applies solely to connections, extensions, additional tracks and facilities, and does not apply in any way to the properties to which such connections and other properties are added. The first part of the sentence gives power to the Board of Commissioners to determine the location and plans of construction of the connections, extensions, additional tracks or facilities. This cannot apply to the original railroad as the locations and plans of construction of such railroad not only have already been determined, but the railroad has in fact been

constructed. The sentence also gives power to the Board of Commissioners to determine the time within which the connections or other additional property shall be constructed. The sentence next gives power to the Board of Commissioners to determine the compensation to be made for the connections or other additional property, as the right to build the original railroad was given under a franchise which was sold at public auction for account and benefit of the City.

Section 32 as phrased could not give power to the Commission to change the fare on the main properties unless it also gives power to the Commission to change other matters pertaining to the main properties. If the words apply at all to the main properties, there is nothing to confine them to the power to change the fare. Yet in the sentence in the statute requiring the terms of sale of the franchise of the original railroad to prescribe the rates of fare, the terms of sale are also required to specify the amount of the capital of the corporation, the number of shares of capital stock which the corporation shall be authorized to issue and the maximum amount of the bonded indebtedness which the corporation may be authorized to incur. Section 32 does not give power to change the capitalization of the corporation or to change the amount of the bonded indebtedness which may be incurred; it is equally obvious that Section 32 does not give power to change the fare on the main properties.

There is no provision in the statute authorizing the amendment of the terms of sale so as to prescribe a rate of fare on the original railroad different from that prescribed in the franchise. If the rate of fare on the original railroad may be determined in the Certificate authorizing the construction of the extension, there will be two rates of

fares prescribed for such railroad, the one in the articles of sale, and the other in the Extension Certificate. Yet the statute provides that the corporation shall have power to receive compensation for carrying persons not inconsistent with the terms of sale under which the corporation acquired its franchise.

The statute does not require the right to construct an extension to be sold at public sale as it does the right to construct a rapid transit railway. The rate of fare on the main properties prescribed in the terms of sale after public sale could immediately be changed without a public sale by a provision in the Certificate authorizing the construction of any facility, additional track, extension or connection, if Section 32 gave power to change the fare prescribed on the original railroad. Such power would be in conflict with the policy of the statute.

If the argument of the City were sound, not only could the Commission change the fare on the railroad every time a facility or additional track were added, but it could in addition prescribe a different fare for the original railroad, a connection, an extension, an additional track and a facility.

Section 32 of the statute indicates that the extension is to be merely an extension whose fare is to be determined by the franchise of the original railroad as the section provides that after the Certificate is granted, authorizing the construction of the additional property, the railway company is to continue to possess its existing franchises and that the railway company may construct the connections, extensions, additional tracks or facilities with all the rights and with the same effect as if such connections, extensions, additional tracks or facilities had been a part of the original route of its railway then in actual operation.

There was no power given to the Commission in the statute as it was in 1913 after amendment, in granting authority to construct extensions, to change the fare prescribed by their franchise on the railroads to which the extensions were added.

The statute as it was in 1913 is set forth in the amendments of 1909 (Chap. 498, Laws of 1909), and in the amendment of 1912 (Chap. 226, Laws of 1912). There are other amendments before 1909, but unless preserved in the amendments of 1909 and 1912 they are helpful only in showing the transition in the statute between 1891 and 1909.

The statute as it was in 1913 was very similar in many respects to the statute as it was in 1891. The provision in the statute in 1913, on which the City relies for authority in the Commission in authorizing the construction of an extension to change the fare on the railroad to which the extension is added was practically the same as in the statute of 1891 before amendment. Certain changes, however, were made in the statute. The requirement in the 1891 statute that the franchise for the construction and operation of a rapid transit railway should be sold at public auction was eliminated in the statute as it was in 1913; the requirement that the terms of sale should prescribe the fare to be charged was also eliminated. Under the statute as it was in 1913 either the Commission may authorize private individuals to build a railroad in the City at their own expense, or the City may construct such railway at its expense. If the railway is to be constructed by private individuals, the statute prescribes the manner of disposing of the franchise. The franchise so disposed of must make adequate provision for efficiency of service not at rates prescribed by the Commission in the terms of sale as in

the statute of 1891 before its amendment, but at reasonable rates.

The amendments to the statute prior to 1909

In the amendment made in 1894 (Chap. 752, Laws of 1894) two changes were made in the section (Sec. 7) of the statute, which prior to the amendment required the franchise to construct and operate a railway in the City to be sold at public auction in every case. The amendment provided that after the Board of Commissioners had secured the necessary consents and prepared the detailed plans and specifications it should sell the franchise at public sale only in case it had been determined by vote of the people that the railway should not be constructed for and at the expense of the City. The amendment also provided that if it were determined by vote of the people that the railroad should not be constructed by the City at its own expense, the terms of sale under which the franchise was to be sold at public auction must prescribe not only the rate of fare to be charged, but that such rate should not exceed five cents a ride. In the amendment of 1894 no change whatever was made in the section (Sec. 32) which gives power to the Commission to authorize the construction and operation of connections, extensions, additional tracks and facilities.

In the amendment made in 1895 (Chap. 519, Laws of 1895) several changes were made in the section (Sec. 32), of the 1891 statute relating to extensions, but none of these changes gave power to the Commission to change the fare prescribed for the railways to which the extensions or other property is added. One of the changes in the 1895 amendment is that the right to construct the connections or other additional property shall be made upon condition that the

corporation shall from the commencement of operation of the connections or other property so added, pay annually to the City a sum or rental which shall be prescribed in the authorization to construct and operate such properties. It is also provided in the 1895 amendment that the Certificate authorizing the construction of such additional property, when accepted by the railway corporation, shall be deemed to constitute a contract between the City and the railway corporation the terms of which may with the consent of the company be modified, from time to time, by the Board of Commissioners.

In the amendment made in 1902 (Chap. 584, Laws of 1902), certain changes were made in Section 32 of the 1891 statute relating to extensions or other additional property, but no provision in the amendment gives power to the Commission to change the fare prescribed for the properties to which the connections or other properties are to be added. Prior to the 1902 amendment the statute provided that power could be given to the Board of Commissioners to authorize the construction of connections or such additional properties upon the application of a railroad corporation owning or operating a railroad wholly or in part within the limits of the City. By the 1902 amendment the application may be made also by "any railroad corporation now or hereafter incorporated and for the purpose so declared in its articles of association, of constructing and operating a tunnel railroad or railroads in the said city, to be connected with any railroad or railroads within the state of New York or any adjoining state and thereby forming a continuous line for the carriage of passengers and property between a point or points within and a point or points without the said city". This amendment applied to an interstate railroad. The Board of Commissioners obviously

was not given power to change the rate of fare on the interstate railroad.

In the amendment of 1906 (Chap. 472, Laws of 1906) it is stated in Section 3 that Section 32 of the Act of 1891 is amended, and in Section 4 it is stated that a new Section 32-a is added. This has caused some confusion. The truth is that a new Section 32 was added by the amendment of 1906 and that Section 32-a of that amendment is an amendment of Section 32 of the 1891 statute.

In the amendment of 1906 the provision giving power to the Commission to authorize a corporation owning interstate railways to construct extensions was made a separate section. This new Section 32 provides among other things, that the Board of Commissioners with the approval of the Board of Estimate and Apportionment or other analogous local authority of the City may grant a franchise or enter into a contract upon application to the Board of Commissioners by any railway corporation incorporated for the purpose of constructing and operating a tunnel railroad from an adjoining state under the Hudson River or Harlem River to a terminus within the City; such railroad to be connected with some trunk line or steam railroad whose terminus is in an adjoining state, thereby forming a continuous line for the carriage of passengers and property between a point within such adjoining state and a point within the City of New York.

Section 32-a as set forth in the 1906 amendment gives power to the Commission to authorize the construction of connections, extensions, additional tracks or facilities to existing railroads in the City. In each of these sections, Section 32 and Section 32-a, there is the same provision as to the determination of the locations of the railroads, the plans of construction and related matters, although one

section applies to interstate railroads and the other to connections, extensions, additional tracks and facilities to intrastate railroads:

Provisions of Section 32 of the 1906 amendment as to locations, plans of construction and related matters in respect of interstate railroads:

"The said board shall, with like approval, fix and determine the locations and plans of construction of the railroad or railroads upon such route or routes, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by the railroad corporation to which the grant shall be made, or with which the contract shall be entered into, *and such other terms, conditions and requirements as to the said board may appear just and proper,* * * *".

Provisions of Section 32-a of the 1906 amendment as to location, plans of construction and related matters in respect of connections, extensions, additional tracks or facilities to existing railroads:

"* * * the said board shall with like approval fix and determine the locations and plans of construction of the railways upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and *such other terms, conditions and requirements as to the said boards may appear just and proper,* * * *".

The same language is used in each of the foregoing sections as is used in Section 24 of the statute as it was in 1913, although one of the foregoing sections applies to interstate railroads where the Commission would not have power to change the rate of fare on the main properties.

We now come to the amendments of 1909 and 1912.

In the statute as it was in 1913 (being the amendments of 1909 and 1912) the Board of Commissioners was given power to authorize the construction of a railroad in the City by a private corporation and was required to provide in the franchise for reasonable rates of fare.

We now come to the amendments of 1909 (Chap. 498, Laws of 1909) and 1912 (Chap. 226, Laws of 1912) which set forth the statute as it was in 1913. Certain sections of the statute giving power to the Board of Commissioners to authorize the construction and operation of a railway in the City are amended by the amendments of 1909 and 1912 and certain other sections pertaining to the same matter were repealed. Section 32-a of the Amendment of 1906, giving power to the Board of Commissioners to authorize the construction and operation of connections, extensions, additional tracks and facilities is amended and is renumbered Section 24.

The statute as it was in 1913 provides that the Public Service Commission of the first district upon its own motion may or upon the request of the local authorities of the City shall proceed to consider and determine whether it is for the interest of the public and of the City that a rapid transit railroad should be established in the City; for this purpose the Commission shall conduct such an inquest and investigation as may be deemed necessary. If after such inquest and investigation the Commission shall determine that a rapid transit railroad is necessary, it shall proceed to determine and establish the routes and the general plans of construction. Such general plans of construction shall show the general mode of operation and contain such details as to the manner of construction as may be necessary to show the extent to which any street shall be encroached upon and the property abutting thereon affected. The

Commission is then required to secure the consent of the owners of one-half in value of the property bounded on the street on which the railroad is to be constructed, and also the consent of the local authorities having control of the street, to the locations of the routes and the general plans of construction. (Sec. 1, Chap. 226, Laws of 1912, amending Section 4, Chap. 4, Laws of 1891.)

The foregoing provision is substantially the same as the corresponding provision in the statute as it was in 1891 before amendment.

After the Public Service Commission has determined the routes of the proposed railroad and the general plans of construction, it shall transmit to the Board of Estimate and Apportionment of the City a copy of the general plans of construction and conclusions adopted by the Commission. The Board of Estimate shall proceed with the consideration of the general plans of construction and shall vote upon a resolution to approve such plans and to consent to the construction of the railroad. Upon adoption of such a resolution by the Board of Estimate and Apportionment and the approval of the Mayor "the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be the consent of the local authorities of such city".

Upon obtaining the approval and consent of the local authorities the Public Service Commission shall take the necessary steps to obtain the consent of the property owners.

The Board of Estimate and Apportionment shall be deemed to be the local authority in control of the streets and the consent of such Board and of the Mayor shall be the only consent of local authorities required (Sec. 1, Chap. 498, Laws of 1909, amending Sec. 5, Chap. 4, Laws of 1891.)

The foregoing provisions are very similar to the corresponding provisions contained in Section 5 of the statute as it was in 1891 before amendment.

When the consent of the local authorities and of the property owners or in lieu of the consent of the property owners the authorization of the court, shall have been obtained, the Public Service Commission shall proceed to prepare detailed plans and specifications for the construction of such railroad in accordance with the general plans of construction (Sec. 1, Chap. 498, Laws of 1909, amending Section 6, Chap 4 of the Laws of 1891).

The foregoing provision is very similar to the corresponding provision contained in Section 6 of the statute as it was in 1891 before amendment.

At this point a change was made in the statute by the amendment of 1909. Under the 1891 statute after the Commission had secured the necessary consents and had prepared the detailed plans and specifications, it was required to sell at public auction in the city where the railroad was to be constructed and for the account and benefit of the city, the right and franchise to construct and operate the railroad. The terms of sale were required to prescribe the fare to be charged. The foregoing provisions were contained in Section 7 of the statute as it was in 1891. By the amendment of 1909, Section 7 of the Laws of 1891 was repealed. In Section 5 of Chapter 498 of the Laws of 1909, it is provided that a new section to be known as Section 22 shall be inserted. The heading of this new section is "Private construction; franchise to construct, maintain and operate".

This new Section 22 provides that when the necessary consents have been obtained and the detailed plans and specifications have been prepared "the commission may

with the approval of the board of estimate and apportionment or other analogous authority of such city, grant a franchise to construct, maintain and operate such railroad for the transportation of passengers and property for compensation. The commission shall have power to prescribe all such terms and conditions of such grant and to require such security to be given and filed for the keeping and performance of such terms and conditions as it may deem to be for the interest of the public and of the city, * * *".

"The grant shall provide that such railroad shall be constructed by and at the expense of the grantee under the direction and supervision of the commission and in accordance with such detailed plans and specifications; that the construction shall be begun within a time to be specified and shall be finished within a specified time."

The grant shall contain a reservation to the City of the privilege upon giving a specified notice to terminate the franchise and to purchase and take the plant and property of the grantee suitable to and used for the purpose of such railroad at any time after the expiration of ten years from the date when operation of any part of said railroad shall begin upon paying an amount for the plant and property which shall not exceed actual cost of the plant and property plus fifteen per cent thereof and shall decrease under provisions of the grant as the franchise continues so that at the end of the full term of the grant no amount shall be paid except for the equipment (Sec. 22).

Section 22 of the amendment of 1909 then contains the following important provision in reference to the fare to be charged:

> "The grant shall make adequate provision for lien upon plant and property and by way of penalty or forfeiture of the grant and any construction pursuant

thereto or otherwise to secure compliance with the terms of said grant, *efficiency of service at reasonable rates* and the maintenance of the property in good condition throughout the full term of the grant."

The net income under Section 22 may be divided between the City and the grantee of the franchise.

A Certificate shall be prepared by the Commission, setting forth in detail the action taken and grant made by the Commission with respect to such railroad and the terms and conditions on which it is made, which Certificate shall be delivered to the grantee upon receipt by said Commission of a written acceptance of the terms, conditions and requirements of the grant duly executed by the grantee so as to entitle it to be recorded. The Certificate shall be deemed to constitute a contract between the City and the grantee (Sec. 22).

In this new Section 22 the following method of disposing of the franchise to construct the railroad is provided:

"After the proposed certificate shall have been prepared and approved as to the form thereof by the Board of Estimate and Apportionment, or other such local authority of said city, the Commission shall, prior to the granting of any such franchise, advertise for proposals or bids for such franchise under such certificate by a notice to be printed once a week for two successive weeks in not less than two daily newspapers published in said city, * * * such notice shall set forth the points within said city between which such railroad is proposed to be operated, the route or routes, in general terms, to be followed, and such other details and specifications as the Commission shall deem proper, and shall refer to such proposed certificate and the said routes, detailed plans and specifications on file in its office for further details. Said notice shall state the time and place at which proposals will be received

and opened. All such proposals shall refer to such proposed certificate and shall offer the terms upon which any such proposer or bidder shall undertake to construct, maintain, equip and operate said railroad in so far as to set forth all or any of the following matters as may be required by the Commission: (1) the annual interest desired upon the cost of construction and equipment prior to payment of any part of income or increase to the city; (2) the period at the end of which the plant and property except equipment as aforesaid shall become the property of the city without compensation; (3) the amount of money for which galleries for subsurface structures to be paid for with public money in connection with the construction of such railroad will be constructed; (4) such transfer convenience with other roads, specifications as to the cost of construction and other provisions as the Commission may think proper to require. The Commission shall attend at the time and place specified and shall publicly open all proposals that shall have been received, but the Commission shall not be bound to accept any proposals so received, but may reject all such proposals and readvertise for proposals in the manner hereinbefore provided, or may accept any of such proposals as will, in the judgment of said Commission, best promote the public interest, and grant a franchise and execute such certificate accordingly, subject to the approval of the Board of Estimate and Apportionment, or such other analogous authority of such city."

The amendments of 1909 and 1912 (Sec. 26, Chap. 498, Laws of 1909, as amended by Sec. 5, Chap. 226, Laws of 1912) provide that instead of disposing of the franchise in the foregoing manner to private individuals the City may construct the railroad at public expense.

In the Act as it was in 1913 the Board of Commissioners is given power to authorize the construction of connections, extensions, additional tracks and facilities to existing railroads but is given no power to change the rate of fare on the railroads to which the connections or other property is added.

The statute as it was in 1913 gave power to the Public Service Commission to authorize the construction and operation of connections, extensions, additional tracks and facilities to rapid transit railroads in the City. In 1891 such power was given to the Commission in Section 32. In 1913 the same power was given in Section 24 of the 1909 amendment, the title of which is: "Connections with other railroads, stations and ferries."

Subdivisions 1 and 6 of Section 24 as set forth in the 1909 amendment were again amended in 1912 by Sections 3 and 4 of Chapter 226 of the Laws of 1912, but the other subdivisions of Section 24 as contained in the amendment of 1909 remained unchanged in 1913.

The procedure in 1913 for granting authority to construct extensions to existing railroads was very similar to that provided in the Act as it was in 1891 before amendment. Both the Act as it was in 1891, Section 32, and the amendment of 1912, Subdivision 1 of Section 24, contained the words on which the City relies for power in the Commission in authorizing the construction of an extension to change the fare on the railroads to which the extension is added.

The procedure under the amendments of 1909 and 1912 for granting authority for constructing an extension is substantially as follows:

The Public Service Commission may with the approval

of the Board of Estimate and Apportionment upon application of a corporation owning, leasing or operating a railroad wholly or in part within the limits of the City if in the judgment of the Commission the public interests so demand, fix and determine the routes by which such corporation may connect with other railroads or the stations thereof or with ferries or bridges or may extend its lines within the City; the Commission may with like approval authorize such a corporation to lay an additional track or tracks on, above, under or contiguous to a portion or the whole of the route or routes of its railroad within said City, and to acquire terminal or other facilities or authorize the corporation to lay its tracks and operate its railroad to any terminal or terminals within the City and to transport passengers and freight.

Section 24 then contains the following provision on which the City relies:

> "and the commission shall with like approval fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper, * * *".

The authorization to construct such extensions or other properties must be made upon the condition that the corporation will pay annually to the City a sum or rental which may be a part or proportion of gross or net receipts. Such authorization may provide in lieu of such rental that the gross or net receipts derived from the operation of the railroad to which the extensions are added and from the

operation of the extensions may be combined and that the City may receive as compensation a specified part or proportion of the income, earnings or profits of the railroad and of the properties added to the railroad.

The authority to construct the extensions or other properties shall contain a reservation to the City of the privilege upon giving a specified notice to terminate the franchise and to purchase and take the extensions or other property at any time after the expiration of ten years from the date when operation of such property was begun upon paying amounts for the property so taken which shall not exceed the actual cost plus fifteen per cent of such cost and shall decrease under provisions of the grant as the franchise continues so that at the end of the full term of the grant or at the end of a period specified therein no amount shall be paid except for betterments, additions, improvements and additional equipment (Sec. 3, Chap. 226, Laws of 1912, amending Sec. 1, Chap. 498, Laws of 1909).

The Certificate authorizing the construction of such connections or additional property shall be prepared by the Commission, setting forth in detail the action taken by the Commission with respect to such property and the terms, conditions and requirements, including provisions as to the annual payments and readjustments thereof; such Certificate shall be delivered to the corporation upon receipt by the Commission of a written acceptance of said terms, conditions and requirements duly executed by the corporation (Sec. 7, Chap. 498, Laws of 1909, amending Sec. 32-a, Chap. 4, Laws of 1891, as amended in 1906).

The Certificate so granted by the Commission shall be filed in the designated public office "and thereupon, and upon fulfillment, by such person, firm or corporation, so far as it relates to such connections, additional track or

tracks, or facilities, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state, and upon fulfillment by such person, firm or corporation of such other terms, conditions and requirements enumerated in said certificate, as the commission may require to be fulfilled as a condition precedent to commencing said work, said person, firm or corporation shall in such cases possess in addition to existing franchises all the powers conferred by this act upon corporations with respect to his or its railroad authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed such person, firm or corporation may construct the same with all the rights, and with like effect as though the same had been a part of the original route of his or its railroad then in actual operation or in process of construction * * *." (Subdiv. 3, Sec. 24 of the Act as amended by Sec. 7, Chap. 498, Laws of 1909).

The Certificate prepared by the Commission when delivered and accepted by the corporation shall be deemed to constitute a contract between the City and the corporation (Subdiv. 4, Sec. 24, as amended by Sec. 7, Chap. 498, Laws of 1909). The construction and operation of such connections, extensions, additional track or facilities is authorized only upon condition that the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having the control of the portion of the street upon which it is proposed to construct the railroad be first obtained or in lieu of the consent of the property owners a proper order of court is ob-

tained (Subdiv. 5, Sec. 24, as amended by Sec. 7, Chap. 498, Laws of 1909).

The Certificate granting the authority to construct such connections, extensions or facilities (but this shall not apply to additional track) shall provide that upon expiration of the period fixed therein the franchise shall end and that upon such termination all the rights of property of the grantee in the street shall cease and terminate without compensation and shall further provide that upon expiration of such franchise the connections, extension or facility constructed pursuant to such Certificate, except betterments, additions, improvements and additional equipment, shall become the property of the City without further or other compensation to the grantee.

Every consideration advanced in this brief at p. 27 to show that Section 32 of the 1891 statute before it was amended did not give power to the Commission in authorizing the construction of extensions to change the fare on the railroads to which the extensions were added and did not, in fact, have any application whatever to the properties to which the extensions were added applies with equal force to Section 24 of the statute as it was in 1913, which contains the same language as Section 32. The problem under the 1891 statute before the amendment was whether Section 32 gave power to the Commission in authorizing an extension to change the rate of fare which the same statute required the terms of sale to prescribe for the properties to which the extensions were added. The problem under the statute as it was in 1913 after various amendments is whether Section 24 with the same language gave power to the Commission in authorizing the construction of an extension to change the rate of fare on the railroad to which the extensions are added, when the statute itself

prescribes that reasonable rates of fare shall be charged on such railroad.

Whenever the Legislature intended to give power to the Commission under this statute, to regulate or change the fares to be charged, it did so in clear and unambiguous language, just as the rule of construction required. The statute with its various amendments up to 1913 did contain from time to time specific and definite fare provisions, but such a provision was never contained in the section authorizing the construction of extensions.

It could not seriously be urged that the language upon which the City and the Commission rely could not without straining it be confined to the extensions and have no application to the properties to which the extensions are added. The rule of construction is clear that where power is to be given to regulate fares, it must be expressed in language which could not fairly or reasonably have any other meaning. The City and the Commission urge that such language without referring to fare or to the railroads to which the extensions are added is sufficient under such a rule of construction to give power to the Commission to change the rate of fare to be charged on the railroads to which the extensions are added when the same statute provides that reasonable rates of fare shall be charged on such railroads.

As Section 24 gives no power to change the fare on a railroad constructed under the Rapid Transit Act, it also gives no power to change the fare on the railroads owned by the Manhattan Railway Company and operated by the Interborough Company, although these railroads were not constructed under the Rapid Transit Act; the franchise under which the elevated railroads owned by the Manhattan Railway Company were constructed determines the

rate of fare which may be charged and such franchise does not limit the rate of fare to five cents a ride.

POINT II.

The local authorities of the city had no power under the Constitution to condition their consent to the construction of the extensions on a change of the rate of fare prescribed in its franchise for the railroads to which the extensions are added, as the Rapid Transit Act provides that the consent of the local authorities shall not be so conditioned.

The Constitution of the State of New York, Article Three, Section Eighteen, provided in 1891, when the Rapid Transit Act was first enacted and in 1913 when the Extension Certificate was granted, that no law shall authorize the construction or operation of a street railway except upon the condition that the consent of the local authorities having the control of that portion of the street upon which it is proposed to construct or operate such railroad be first obtained.

The Constitution merely made the consent of the local authorities a condition to the construction of a railroad in the City. The Legislature under this constitutional provision might give to the Commission the power to authorize the construction and operation of a railroad and to prescribe the terms and conditions on which the railroad should be constructed and operated. Under such a statute the sole power of the local authorities under the Constitution would be to consent or to refuse to consent to the con-

struction of the railroad on the terms and conditions imposed by the Commission. If the local authorities should refuse to consent the railroad could not be constructed. The statute might even provide that the Commission should merely indicate to the local authorities the streets on which the railroads would be located, and the extent to which they would occupy the streets, and require that the Commission before proceeding further with the authorization of the construction of the railroad should determine whether the local authorities would or would not consent to its construction. The statute could provide that if such consent were given, the Commission should thereafter impose the other terms and conditions including the fare to be charged on the railroads.

The Constitution not only does not require that the local authorities shall be permitted to determine the rates of fare to be charged on the railroads, but it does not even make it necessary that the local authorities should be informed as to the rates to be charged at the time they give their consent or refuse to give it.

We have examined the statute for the purpose of determining whether the Commission in authorizing the construction of the extensions had power to change the rate of fare to be charged on the railroad to which it was added. We now examine the statute for the purpose of determining whether the Commission in consenting to the construction of the extensions had power to change such fare.

Examination of the Rapid Transit Act as it was in 1891 (Chap. 4, Laws of 1891) for the purpose of showing that the local authorities had not the power in consenting to the construction of a railroad in the City, to condition such consent by restricting the rate of fare to be charged on the railroad.

The pertinent provisions of the 1891 statute, before its amendment, bearing on local consent to the construction of a railroad in the City, are as follows:

The Board of Commissioners may locate the route of the railroad to be constructed upon the streets in the City and determine the general plans of construction which general plans shall show the mode of operation and contain such details as may be necessary to show the extent to which any street is to be encroached upon and the property abutting thereon affected:

> "provided that the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railway or railways be first obtained, * * *". (Sec. 4, Chap. 4, Laws 1891.)

After the Board of Commissioners has determined the routes of the railroad to be constructed and the general plans of construction

> "the said board shall transmit to the common council of said city a copy of said plans and conclusions as adopted. It shall be the duty of such common council upon receiving such copy of plans and conclusions to appoint a day not less than one week nor more than ten days after the receipt thereof for the consideration of such plans and conclusions, and the said common council shall, on the day so fixed, proceed with the

consideration thereof and may continue and adjourn such consideration, from time to time, until a final vote shall be taken thereon, as hereinafter provided. Within four weeks after the copy of such plans and conclusions adopted by the board of rapid transit railroad commissioners shall have first been received by said common council, a final vote shall be taken thereon, by ayes and nays, in the form of a vote upon a resolution to approve such plans and conclusions, and to consent to the construction of a railway or railways in accordance therewith. Upon the adoption of such resolution by a majority vote of all the members of the common council and the approval of the mayor, and in the case of the refusal or failure of the mayor to approve such resolution, then by a two-thirds vote of all the members of the common council, *the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be the consent of the local authorities of such city;* provided, that where in any such city the exclusive control of any street, road, highway or avenue which is to be used or occupied by any railway or railways constructed under the provisions of this act, is by law vested in any local authority other than the common council of such city, the approval of the aforesaid plans and conclusions and the consent to the construction of a railway thereunder shall be given by such local authority in place of and if required in addition to such approval and consent by said common council and with like effect. Upon obtaining the approval and consent of the local authorities, as above provided, the said board of rapid transit railroad commissioners shall take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes." (Sec. 5, Chap. 4, Laws of 1891.)

The statute thus provided that the Commissioners must secure the consent of the local authorities to the general

plans of construction which show the extent to which the street will be encroached upon by the railroad before the Commission proceeds further with the authorization of the construction of the railroad; the statute further provides that when the general plans of construction have been consented to and adopted by the common council of the City, such consent shall be deemed to be the consent of the local authorities of the City. The statute thus prescribes the conditions under which the local authorities shall give or withhold their consent. When such consent is given the requirement of the Constitution has been fulfilled. If it is not given, the railroad cannot be constructed.

> "When the *consents of the local authorities* and the property owners, or in lieu thereof, the authorization of the said supreme court upon the report of commissioners, *shall have been obtained, the board of rapid transit railroad commissioners shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railway or railways,* * * *." (Sec. 6, Chap. 4, Laws of 1891.)

The detailed plans of construction are to be prepared by the Commission as the statute prescribes, after the consent of the local authorities has been obtained.

> "*The said board after having secured the necessary consents and after having prepared such detailed plans and specifications as are by this act provided for, shall sell at public auction in the city where said railway or railways are to be built and for the account and benefit of said city the right, privilege and franchise to construct, maintain and operate such railway or railways.* * * *" (Sec. 7, Chap. 4, Laws of 1891.)

The sale of the franchise is to be made after the local authorities have given their consent to the general plans

of construction which is the only consent which shall be required of the local authorities, and after the Commission which has theretofore obtained the consent of the local authorities to the general plans of construction has prepared the detailed plans of construction.

> "The said terms of sale must also specify the amount of the capital of any such corporation, and number of shares of capital stock which such corporation shall be authorized to issue, the percentage to be paid in cash by the subscribers on subscribing for such shares, the maximum amount of the bonded indebtedness which such corporation be authorized to incur, and which may be secured by mortgage upon its property and franchises, *and the maximum rates of fares and freight which such corporation may charge and collect for the carriage of persons and property. The said board may, if it considers that the public interest requires it do so, reject all bids and readvertise the said rights, privileges and franchises for sale, with the same or different terms of sale, as often as it may deem necessary in the interest of such city,* and shall finally accept that bid, which under all circumstances in its opinion is most advantageous to the public and such city; and no bid shall be accepted without the concurrent vote of four members of the board. *The terms of sale on any such resale must contain all the provisions required by this act to be inserted in the original terms of sale.*" (Sec. 7, Chap. 4, Laws of 1891.)

Under the statute the rates of fare to be charged are prescribed in the articles of sale alone, to which the consent of the local authorities is not to be given; the terms of sale which are part of the franchise are prepared by the Commission not only after the consents of the local authorities have been given to the general plans of construction, but

after the Commission has prepared detailed plans. The franchise may be offered for sale from time to time with different articles of sale and yet the only consent required of local authorities was to the location of the routes and to the general plans of construction which would not be changed on a subsequent offering of the franchise for sale.

> "Within one year, and not less than six months, prior to the expiration of any term for which such rights, privileges and franchises shall have been sold, said board shall proceed to resell the right to maintain and operate the said railway. Such sale shall be made in the manner prescribed for the original sale, * * *." (Sec. 8, Chap. 4, Laws of 1891.)

The consent of the local authorities therefore is not to be obtained to the articles of sale which alone prescribe the fare to be charged on the railway. The statute contemplates that the local authorities shall either consent or refuse to consent to the location of the routes on the streets and to the general plans of construction; that their consent shall not extend to the detailed plans of construction, the sale, the articles of sale or the fare to be charged which is to be prescribed in the articles of sale. If no satisfactory bid is received when the franchise is first offered for sale the franchise may be offered for sale from time to time with different terms of sale. As the location of the routes and the general plans of construction are not changed on such a resale even where the terms of sale are changed, no additional consent of the local authorities is to be secured, although the rate of fare to be charged as prescribed on the second offering of the franchise for sale may be different from the rate of fare prescribed in the first offering.

Examination of the Rapid Transit Act as it was in 1891 (Chap. 4, Laws of 1891) for the purpose of showing that the local authorities had not the power in consenting to the construction of extensions to existing railroads in the City, to condition such consent on a change of the rate of fare to be charged on the railroads to which the extensions were to be added as prescribed by their franchise.

The statute of 1891 before amendment (Sec. 32) provides that the Board of Commissioners shall determine the routes and locations and plans of construction, the times within which the connections, extensions, additional tracks or facilities shall be constructed, the compensation to be made therefor to the City, and such other terms, conditions and requirements as to the Board of Commissioners may appear just and proper. A Certificate must be prepared by the Board of Commissioners setting forth in detail the action taken by the Board with respect to the connections, extensions, additional tracks and facilities, and the terms, conditions and requirements. The provision in the statute of 1891 (Sec. 32) in respect of local consent to the construction of connections, extensions, additional tracks or facilities is as follows:

> "The said certificate shall be filed in the office of the Secretary of State, and a duly certified copy thereof shall be filed in the office of the clerk of the county in which the railways of said railway corporation are situated, and thereupon, and upon fulfillment by such railway corporation, so far as it relates to such connections, additional track or tracks, or facilities, *of such of the requirements and conditions as are necessary to be fulfilled in such cases*, under section eighteen of article three of the Constitution

of this State, and upon fulfillment by such railway corporation of such other terms, conditions and requirements enumerated in said certificate, as the said board may require to be fulfilled as a condition precedent to commencing said work, said railway company shall in such cases possess in addition to existing franchises all the powers conferred by this act upon corporations specially formed thereunder, with respect to its railways authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such railway company may construct the same with all the rights, and with like effect as though the same had been a part of the original route of its railway then in actual operation. But the construction and operation of such connections, extensions, additional track or tracks, or facilities, are hereby authorized only upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon, above or under which it is proposed to construct or operate the same, be first obtained, or in case the consent of such property owners can not be obtained, the general term of the Supreme Court in the district in which they are proposed to be constructed, may, upon application, in the same manner and on the same notice specified in section five of this Act, appoint three commissioners, who shall determine after a hearing of all parties interested, whether the same ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

The statute does not require the consent of the local authorities to any of the terms contained in the Certifi-

cate granting authority to construct the connections, extensions, additional tracks or facilities, but merely requires that there shall be a fulfillment by the railway company so far as it relates to such connections, additional tracks or facilities of such of the requirements and conditions as are necessary to be fulfilled under Section Eighteen of Article Three of the Constitution of New York.

The statute provides that the railway corporation must fulfill two sets of requirements: (1) such requirements and conditions as are necessary to be fulfilled in case of extensions under the Constitution; (2) such other terms, conditions and requirements enumerated in the Certificate as the Commissioners may require to be fulfilled as a condition precedent to commencing said work. The consent of the local authorities is not necessary to all the terms, conditions and requirements of the Certificate.

Even if the consent of the local authorities were required by the statute to all the terms, conditions and requirements of the Certificate granting authority to construct the connections or other property, yet, as the Commission itself is not given power to change the fare on the railways to which the extensions are to be added and cannot therefore provide in the Certificate as one of the terms, conditions or requirements that the rate of fare on the railways to which the extensions are to be added shall be changed, the local authorities even on this assumption could not change the rate of fare on such railroads.

Examination of the Rapid Transit Act as it was in 1913 for the purpose of showing that the local authorities had not the power in consenting to the construction of a railroad in the City, to condition such consent by restricting the rate of fare to be charged on the railroad.

The statute as it was in 1913 in respect of the consent of the local authorities to the construction of a railroad in the City is substantially the same as it was in 1891.

If the Public Service Commission, after consideration and inquest, shall determine that a rapid transit railroad is necessary for the interest of the public and such city, it shall proceed to determine and establish the routes and the general plans of construction; provided that "the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having control of that portion of a street * * * or highway upon which it is proposed to construct or operate such railroad or railroads be first obtained * * *." (Sec. 1, Chap. 226, Laws of 1912, amending Sec. 4, Chap. 4, Laws of 1891.)

After the determination by the Public Service Commission of the routes and the general plans of construction of the railroad, the Commission shall transmit to the Board of Estimate and Apportionment or other board or boards of the City having control of the streets, a copy of said general plans and the conclusions adopted by the Commission. The Board of Estimate and Apportionment shall proceed to consider the general plans and conclusions and shall determine by resolution whether to approve such plans and conclusions and to consent to the construction of the railroad in accordance therewith.

"Upon the adoption of such a resolution by a

majority vote of all the members of the Board of Estimate and Apportionment or other such board or boards having such control, * * * *the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be the consent of the local authorities of such city;* * * *.*" (Sec. 1, Chap. 498, Laws of 1909, amending Sec. 5, Chap. 4, Laws of 1891.)

"When the consents of the local authorities and the property owners, or, in lieu thereof, the authorization of the said appellate division of the Supreme Court upon the report of commissioners, shall have been obtained, the Public Service Commission shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railroad or railroads in accordance with the general plan of construction * * *." (Sec. 1, Chap. 498, Laws of 1909, amending Sec. 6, Chap. 4, Laws of 1891.)

"If or when the necessary consents have been obtained and the detailed plans and specifications have been prepared * * * the Commission may with the approval of the Board of Estimate and Apportionment or other analogous authority of such city grant a franchise to construct, maintain and operate such railroad for the transportation of passengers and property for compensation * * *. The grant shall make adequate provision for lien upon plant and property and by way of penalty or forfeiture of the grant and any construction pursuant thereto or otherwise to secure compliance with the terms of said grant, *efficiency of service at reasonable rates* and the maintenance of the property in good condition throughout the full term of the grant * * *."

A certificate shall be prepared by the Commission setting forth in detail the action taken and the grant made by the Commission in respect to the railroad and the

terms, conditions and requirements imposed by the Commission which shall be delivered to the grantee upon receipt by the Commission of a written acceptance of the terms, conditions and requirements of the grant executed by the grantee.

After the Certificate shall have been prepared and approved as to form by the Board of Estimate and Apportionment, the Commission shall prior to the granting of the franchise advertise for proposals or bids for such franchise under such Certificate. The Commission may reject all proposals and readvertise for new proposals or it may accept any proposal which will in the judgment of the Commission best promote the public interest and grant a franchise and execute a Certificate subject to the approval of the Board of Estimate and Apportionment (Sec. 5, Chap. 498, Laws of 1909, inserting a new section to be known as Sec. 22 in Chap. 4, Laws of 1891).

Examination of the Rapid Transit Act as it was in 1913, for the purpose of showing that the local authorities had not the power in consenting to the construction of an extension to an existing railroad in the City, to condition such consent by changing the fare to be charged as prescribed in the franchise on the railroad to which the extension is added.

The statute as it was in 1913 in respect of the consent of the local authorities to the construction of an extension to an existing railroad in the City is substantially the same as it was in 1891.

Under section 24 of the statute as it was in 1913 the Public Service Commission may with the approval of the Board of Estimate and Apportionment upon application of a corporation owning, leasing, constructing or

actually operating a railroad wholly or partly within the limits of the City if in the judgment of the Commission the public interest so demands, fix and determine the route or routes by which such corporation may construct connections, extensions, additional tracks or facilities; and the Commission shall with like approval fix and determine the locations and plans of construction of the connections or other property upon such routes and of such tracks and facilities, the times within which they shall be constructed, the compensation to be made therefor to the City, and such other terms, conditions and requirements as to the boards may appear just and proper.

A Certificate shall be prepared by the Commission, setting forth in detail the action taken by it with respect to such connecting or extended route and such tracks and facilities and the terms, conditions and requirements. The Certificate shall be filed in the proper public office

> "and thereupon, and upon fulfillment, by such person, firm or corporation, so far as it relates to such connection, additional track or tracks, or facilities, of such of the requirements or conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the Constitution of this State, and upon fulfillment by such person, firm or corporation of such other terms, conditions and requirements enumerated in said certificate, as the commission may require to be fulfilled as a condition precedent to commencing said work, said person, firm or corporation shall in such cases possess in addition to existing franchises all the powers conferred by this act upon corporations with respect to his or its railroad authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such person, firm or corporation

may construct the same with all the rights, and with like effect as though the same had been a part of the original route of his or its railroad then in actual operation or in process of construction, * * *."

"The construction and operation of such connections, extensions, additional track or tracks or facilities are hereby authorized only upon condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway, upon, above or under which it is proposed to construct or operate the same be first obtained * * *." (Sec. 7, Chap. 498, Laws of 1909, amending Sec. 32-a, Chap. 4, Laws of 1891.)

The Commission is given power in the statute, with the consent of the Company, to change the terms of the authorization to construct and operate the extension:

"The terms of such contract may, from time to time, with the consent of such person, firm or corporation be modified by the Commission." (Sec. 7, Chap. 498, Laws of 1909, amending Sec. 32-a, Laws of 1891.)

The local authorities therefore could not condition their consent to the authorization by the Commission of an extension to an existing railroad by changing the fare on such railroad. Every consideration advanced at page 58 of this brief, to show that this was true of the statute in 1891, applies equally to the statute as it was in 1913.

When the Commission authorizes an extension it is necessary only that there be a fulfillment by the corporation so far as it relates to the extension "of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state". It is not necessary that the

local authorities consent to all the terms, conditions and requirements of the Certificate which grants the authority to construct the extensions.

Even if the local consent to all the terms, conditions and requirements of the Certificate authorizing the construction of the extension were necessary, yet, as such Certificate cannot change the rate of fare on the railroads to which the extension is added, the local consent could not be conditioned on a change of such fare. Even on this assumption the local authorities could only consent or refuse to consent to the Certificate prepared by the Commission. The Commission itself has no power to change the fare on the railroads to which the extensions are added.

The Legislature had the power in authorizing the construction of an extension to confine the consent of the local authorities so that the local authorities would have no power whatever over the fare on the railroads to which the extensions are added.

People ex rel. City of New York v. *Nixon*, 229 N. Y. 356.

POINT III.

The fiduciary relation which the statute causes the city to assume in granting authority to construct an extension is inconsistent with power in the city in authorizing the extension to restrict the fare to be charged on the extension and on the railroads to which the extension is added.

Under the Rapid Transit Act and the Extension Certificate the City holds a fiduciary relation in respect of ele-

vated railways owned by the Manhattan Railway Company and the extensions thereto constructed by the Interborough Company at its own expense. Under the statute the Commission grants the franchise to construct and operate for a term of years the extensions to privately owned railroads; the corporation owning or operating the railroads constructs the extensions thereto at its own expense. Thus far the City is merely the grantor of a franchise under which the corporation constructs the properties. The City, however, has an additional and more intimate relation to the properties in the present case.

Under the statute and the Extension Certificate the City and the Interborough Company share in the net profits from the elevated railroads and from the extensions which were added to them.

The statute provides that the Company which is given authority to construct and operate the extensions shall "annually pay to the said city a sum or rental which may be a part or proportion of gross or net receipts" resulting from the operation of the extensions; or in lieu of such rental the gross or net receipts from the operation of the extensions and of the railroads to which they are added may be combined and the City may receive as compensation "a specified part or proportion of the income, earnings or profits of the railroad, and the route or routes, additional track or tracks or facilities whose receipts are so combined or of those and any other railroads which may be operated in connection therewith in like manner, which part or proportion may be deferred to a previous distribution to said person, firm or corporation, which distribution may be cumulative, and in such case such determination, authorization or license may apportion out of the amount

so to be received by the city and shall specify a portion thereof which shall be deemed to be the rental for the use of such route or routes, additional track or tracks or facilities, and shall also provide for determining the amount of the income, earnings or profits of the railroad within the limits of the city and of the route or routes, additional track or tracks or facilities whose receipts are so combined and may provide for readjustment of the proportion which the city shall receive or of the portion thereof which shall be deemed to be the rental for the use of said route or routes, additional track or tracks or facilities at specified intervals, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its proportion of such income, earnings or profits or as such rental upon any such readjustment thereof".

The Extension Certificate provides that the City shall receive as compensation one-half of the combined net receipts of the extensions and of the elevated railroads to which the extensions were added. In ascertaining such net receipts the Extension Certificate prescribes that expenses must be paid out of revenue in the following order:

Taxes; rental under Manhattan lease; operating expenses; maintenance; depreciation; average profit in prior years of Interborough Company out of elevated railroads leased to it by Manhattan Company; interest and sinking fund on bonds, the proceeds of which were used to construct the extensions.

The Extension Certificate further provides that if the revenue in any quarter year shall be insufficient to pay in full all the foregoing items which are to be paid out of revenue, the deficit on each item shall be accumulated; that the deficit on any item of deduction must be paid in full

before any payment whatever shall be made on a subsequent item of deduction. In the order of payment prescribed in the Certificate the rental under the lease of the elevated railways by the Manhattan Company to the Interborough Company must be paid before operating expenses; the average profits to the Interborough Company in past years out of the elevated railroads leased to it by the Manhattan Company must be paid before the interest and sinking fund on the bonds the proceeds of which were used to construct the extensions. This would be an impracticable arrangement if it contemplated that the payment of necessary expenses such as expenses of operation should be subordinated and their payment indefinitely postponed.

Under the Uniform Partnership Statute the receipt of a share of the profits of a business is *prima facie* evidence that the person so receiving such share is a partner in the business. Such inference shall not be drawn however if the share in the profits is received in payment of rent. The share of the profits in this case comes not from the extensions alone, but also from the railroads to which the extensions were added. It is, as the statute indicates, more than rent. Even where the technical requisites of partnership are not present, sharing in profits is sufficient to make an enterprise a joint adventure. The fiduciary relation of the members of a joint adventure is very similar to the relation of partners: *Manners* v. *Morosco*, 252 U. S. 317; *Underhill* v. *Schenck*, 238 N. Y. 7; *Selwyn & Co.* v. *Waller*, 212 N. Y. 507.

In any event, the City took a position in this matter which always imposes, if not a duty to co-operate in making the enterprise a success and in enabling it to earn the profits which are to be shared, certainly a duty in no way

to interfere with the achievement of such success and the realization of such profits.

The City is given the power to terminate the franchise and to purchase the extensions for less than their value; the remaining compensation to the Company, if any, for the property purchased must come out of the revenue up to the time of the purchase.

The City is also given the power in the statute to terminate the franchise to construct and operate the extensions and to purchase the extensions not by paying their then value, but by paying an amount which "shall not exceed actual cost as defined in the grant of said plant and property plus fifteen per centum thereof and shall decrease under the provisions of the grant as the franchise continues so that at the end of the full term of the grant or at the end of a period specified therein no amount shall be paid except for betterments, additions, improvements and additional equipment." (Sec. 3, Chap. 226, Laws of 1912, amending Subdiv. 1, Sec. 24, Chap. 4, Laws of 1891, as amended by Chap. 498, Laws of 1909.)

The Extension Certificate provides that the City may terminate the franchise and purchase the extensions upon written notice to the Company and by paying the amount named in the Extension Certificate. The amount to be paid varies from 115 per cent of the cost of the extensions to zero, depending upon the year in which the franchise is terminated and the property purchased. The extensions were constructed out of the proceeds of bonds sold to the public just as the Extension Certificate contemplated that they should be. Under the arrangement created in the Extension Certificate, these bonds, unless the extensions were purchased by the City, were to be paid through the

sinking fund which was the last item to be paid out of revenue. The amount to be paid by the City on purchase of the extensions is not sufficient to pay in full the principal of all the bonds nor is the amount to be paid by the City the then value of the extensions. The difference between the amount necessary to pay all the bonds and the amount to be paid by the City on the purchase must come out of the earnings through the payments into the sinking fund at the rate of one per cent a year. If, however, the revenue is not sufficient to pay all the items of deduction from revenue, the sinking fund is to be paid only after all other items with accumulations thereon have been paid in full.

At the expiration of the period named in the franchise the City will own the extensions without payment of any compensation; the compensation to the Company, if any, must come out of earnings.

Under the statute the Certificate granting a franchise to construct an extension must provide that "upon the expiration of a period fixed therein the franchise shall end and that upon such termination thereof all the rights of property of the grantee in the streets * * * shall cease and terminate without compensation and shall further provide that upon such expiration of such franchise, right or authority the plant and property together with the appurtenances thereto of the grantee constructed pursuant to such certificate, except betterments, additions, improvements and additional equipment as defined in the grant shall become the property of the city without further or other compensation to the grantee" (Sec. 3, Chap. 226, Laws of 1912).

The Extension Certificate provides that the City will

acquire the extensions at the end of the term named in the Certificate without the payment of compensation and without regard to the value of the extensions, on the theory that proper compensation has been made to the Company out of earnings through the sinking fund of one per cent a year.

The City is given power under the statute to construct and own other railways which will compete with the railways in whose profits the City shares and whose extensions the City may purchase at less than their value; the City is now engaged in constructing such a railroad which will take a substantial part of the traffic from the elevated railroads, but which cannot itself be operated under a five-cent fare unless subsidized by the City.

To protect its right to share in the profits and its right to purchase the extensions for less than their value, the City is given power in the Extension Certificate to participate in the management of the extensions and of the railroads to which the extensions are added.

The purpose of these provisions is stated in the Extension Certificate as follows:

> "It is the intention of the Commission and the Interborough Company, and the foregoing Article shall be construed in accordance with such intention, that the City shall be afforded all proper and necessary means for safeguarding its right to one-half (½) of the excess of net profits of the Company Lines and for safeguarding its exercise of the right to terminate the authorizations or licenses hereby given. At the same time it is neither intended nor desired that the fair

and ordinary discretion of the Interborough Company in the management, construction, equipment, maintenance and operation of the Company Lines shall be interfered with."

The City is thus given the right to participate in the management of the elevated railroads for the purpose of insuring among other things the receipt of as large profits by the City out of the elevated railroads as possible.

It thus appears that the City has the right to receive a share of the profits of the elevated railways; to purchase the extensions for less than their value; to own the extensions at the termination of the franchise without compensation; to participate in the management in order to protect its share in the profits and its right to purchase for less than value; to compete by railroads owned and operated by itself with the properties in which it has the foregoing rights. These rights are inconsistent with the power in the City to prescribe the rate of fare on the extensions and on the properties to which the extensions are added. The Court will not give an unnatural and strained meaning to language in order to give to the City such additional and inconsistent power under such extraordinary circumstances.

If the City had the power to restrict the fare to the extent asserted by it, the only effect would be to enable the City to acquire at the lowest possible price properties in which it had an interest with others, and to that extent to sacrifice the interest of the others. In *Jackson* v. *Ludeling*, 21 Wall. 622, this Court said through Mr. Justice Strong:

"* * * When two or more persons have a common interest in a security, equity will not allow one

to appropriate it exclusively to himself, or to impair its worth to the others. Community of interest involves mutual obligation. Admitting, then, that Gordon had a right to make use of the mortgage to enforce the payment of the bonds which he held, he had no right so to use it as to obtain an advantage for himself over the other bondholders. He had no right to employ it as an instrument by which he might become the owner of the property mortgaged at the lowest possible price at which it could be obtained, leaving the bonds held by his associate holders unpaid. His duty, if he used it at all, was to make it productive of the most that could be obtained for all who were interested in it, and if he sought to make a profit out of it at the expense of those whose rights in it were the same as his own, he was unfaithful to the relation he assumed, and was guilty of fraud. * * *"

POINT IV.

The return on the value of the elevated railroads under the five-cent fare is confiscatory.

The total book value of the elevated railroads, including the improvements made by the Interborough Company, is at least $157,000,000. The Interborough Company earned $3,203,000 on the elevated railroads for the year 1927 before paying any interest charges and $2,572,000 for the year 1928. The foregoing earnings do not represent a reasonable return even on the combined cost of the easements of light, air and access which the Manhattan Railway Company purchased from owners of property abutting on the streets where the railroads are located and on the improvements made by the Interborough Company

after 1913 under Public Service Commission approval. The Manhattan Railway Company paid to purchase the easements of light, air and access $23,000,000. It would cost immensely more to acquire the easements at the present time. The Interborough Company expended $44,000,000 for improvements to the elevated railroads. Before the improvements were made the Manhattan Railway Company had a complete railroad which in 1917 carried 349,000,000 passengers. The return of $3,203,000 before payment of interest in the year 1927 is less than five per cent on the combined cost of the easements and of the improvements, and the $2,572,000 earned in 1928 before payment of interest charges is less than four per cent on the combined cost of such easements and improvements without taking into account the cost or value of the original railway itself.

The earnings of the elevated railroads under the five-cent fare do not suffer by comparison with the earnings of the subways of the Interborough Company. The Interborough Company has failed since Contract No. 3 became effective in 1917 to earn any return on the City's investment of $113,000,000 in the subways. The accrued interest on the City's investment payable out of earnings is as of December 31, 1927, $83,000,000 (R. p. 1330).

When the Extension Certificate was made the City gave clear indication of the amount which it thought the Interborough Company might earn on the value of the elevated railroads with their improvements. This Certificate provides that the City and the Interborough Company shall share the net profits from the elevated railroads. The amount which it is necessary to earn on the elevated railroads over operating expenses and taxes before there would be profits to be shared is as follows:

Interest charges on Manhattan Company bonds	$1,808,000
Interest on securities issued by Interborough Company for improvements to elevated railroads	3,182,000
Dividend rental payable on Manhattan stock under lease	4,200,000
Average annual profits of Interborough Company on elevated railroads before Extension Certificate was granted	1,589,000
Total	$10,779,000

When the Extension Certificate was executed in 1913 it was contemplated therefore that the elevated railroads might earn on their value not only $10,779,000, but also an additional amount representing profits to be divided with the City.

The Order Appealed From Should Be Affirmed.

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Counsel.